

UNITED STATES OF AMERICA
POSTAL REGULATORY COMMISSION
WASHINGTON, DC 20268-0001

Mail Processing Network
Rationalization Service Changes, 2012

Docket No. N2012-1

PRESIDING OFFICER'S RULING
CONCERNING DAVID B. POPKIN MOTION NUMBER 1

(Issued March 6, 2012)

I. INTRODUCTION AND BACKGROUND

On January 6, 2012, the Postal Service filed non-public library reference USPS-LR-N2012-1/NP7 under seal.¹ On January 9, 2012, David B. Popkin filed a motion seeking to make public library reference USPS-LR-N2012-1/NP7.²

After review of material under seal, any party may seek a change in protective status by providing specific and detailed statements as to why the materials should be made public. The request for early termination of non-public status shall be in accordance with 39 CFR § 3007.31(a).

Upon review of the pleadings in this matter, neither Mr. Popkin nor the Postal Service has presented particularly persuasive arguments. Under these circumstances, the status quo should be maintained. The Motion to unseal the library reference is denied.

¹ Notice of United States Postal Service of Filing of Public and Non-Public Library References, January 6, 2012.

² David B. Popkin Motion Number 1, January 9, 2012 (Motion).

Application for non-public status. The Postal Service filed an application for non-public treatment at the time of filing library reference USPS-LR-N2012-1/NP7.³ The Postal Service describes the information contained within the library reference as “data that reveal average daily volumes (ADVs) of First-Class Mail (FCM) carried between specific 3-digit ZIP Code origin and destination pairs and between specific facilities in the Postal Service’s processing network.” Application at 1.

The Postal Service contends that this is commercial information which, under good business practices, would not be publicly disclosed. *Id.* The Postal Service believes that no commercial enterprise would publish disaggregate volume data reflecting originating or destinating volumes for specific market or service areas. *Id.* at 2.

The Postal Service argues that public disclosure could result in commercial harm. It alleges that access to the data would allow competitors in the expedited delivery market to gain insight into customer behavior, evaluate the size of the delivery market in specific service areas, and develop strategies for gaining market share in specific markets. *Id.* at 3. The Postal Service contends competitors would be able to tailor marketing and pricing campaigns to acquire business without having to invest in market research of their own. *Id.* at 4. This would result in the Postal Service losing volume, revenue, and market share. The Postal Service would not have a similar ability to access data regarding competitor volumes.

Popkin Motion. Popkin contends that First-Class Mail is a market dominant product over which the Postal Service has a monopoly. *Id.* at 1. He argues that the Postal Service fails to provide any information or discussion on the relationship between First-Class Mail volume data in the library reference and other mail volumes a competitor could carry outside the monopoly product, such as the equivalent of Express Mail, Priority Mail, or package services. *Id.* at 1-2. Popkin also contends that aggregate

³ Application of the United States Postal Service for Non-Public Treatment of Library Reference USPS-LR-N2012-1/NP7, January 6, 2012 (Application).

data would not provide insight into specific local customer behavior. *Id.* at 2. Finally, Popkin asserts that access to the data is necessary to determine Postal Service compliance with 39 CFR 121.1(a) as it relates to which destination SCFs have a mail volume of at least 1.5 percent of the total annual First-Class Mail volume originating from an origin processing facility so as to qualify for overnight service standards. *Id.*

Postal Service Reply. On January 17, 2012, the Postal Service filed a reply to the Motion.⁴ The Postal Service contends that market dominant status does not preclude non-public treatment. *Id.* at 2. It discounts Popkin's argument that the Postal Service has a monopoly over First-Class Mail, because it believes that monopoly protection provided by the Private Express Statutes has been materially weakened under the Postal Accountability and Enhancement Act (PAEA). *Id.* at 2. The Postal Service also asserts that First-Class Mail and Express Mail face significant competition from customer use of electronic media to transmit messages and conduct transactions, and that businesses providing the electronic transmission of messages do not swap volume data. *Id.* at 3-4.

The Postal Service notes that Popkin does not argue that the protective conditions result in diminished financial transparency, affect the ability to accomplish any public policy or litigation objective, frustrate his ability to identify issues in this docket, prevent analysis of non-compliance with service standard regulations, or prevent the identification of any financial or accountability issue that outweighs the Postal Service's commercial and competitive interests. *Id.* at 4.

The Postal Service states it is concerned with revealing collective mailing patterns of discrete communities or competitive markets, not the mailing practices of individual customers. *Id.* at 5. The Postal Service contends that application of non-disclosure conditions serve the public interest by protecting its commercial interests, while allowing at least some privileged access to the material. *Id.* at 6.

⁴ Reply of the United States Postal Service to David Popkin Motion No. 1, January 17, 2012 (Reply).

Finally, the Postal Service asserts that protective conditions for similar information in Docket No. C2001-3 were upheld by the Commission. *Id.*

II. ANALYSIS

Standard of review. In determining the appropriate protective status of material filed by the Postal Service under seal, the Commission must balance the nature and extent of likely commercial injury identified by the Postal Service in an application for non-public status against the public interest in maintaining the financial transparency of a government entity competing in commercial markets. See 39 U.S.C. § 504(g)(3)(A) and 39 CFR § 3007.33.

Principal argument for disclosure. Popkin states that First-Class Mail is a market dominant product over which the Postal Service has a monopoly. Motion at 1.

Popkin's inference is that information concerning market dominant products which are covered by the monopoly should be publicly available. As the Postal Service notes, whether a product is market dominant or competitive is only one factor to be considered weighing in favor of disclosure. However, it is not decisive in determining the protective status of the material in question. See Postal Service Reply at 2, n.2.

Principal argument for non-disclosure. The Postal Service contends that the materials designated as non-public consist of information of a commercial nature that under good business practice would not be publicly disclosed. Application at 2.

In support of this position, the Postal Service argues that disclosure would allow competitors to gain insight into postal customer behavior, gauge the size of the delivery market in specific areas, and develop marketing strategies for determining what resources to devote to further penetrate specific local markets. *Id.* at 3. The Postal Service states that it is not concerned with the mailing practices of individual customers, but rather the collective mailing patterns of discrete communities or competitive markets. Reply at 5. The Postal Service further asserts that none of its competitors would publish disaggregate volume data, including competitors who transmit information electronically. Application at 2.

The Postal Service does not provide persuasive examples of potential competitors or harm that could be caused by revealing collective mailing patterns. The Postal Service does not describe how competitors in the business of transmitting information electronically would make use of the physical First-Class Mail volume data. As to whether or not competitors would disclose similar information, the Postal Service is a regulated entity with monopoly protection of the underlying product. The competitors are not.

In conclusion, the Postal Service provides a broad assertion of the competitive value of the material filed under seal, but does not provide persuasive argument supporting this assertion.

Other Arguments. Popkin asserts that access to the data is necessary to evaluate compliance with a standard contained within 39 CFR § 121.1(a) concerning the qualification of mail for overnight delivery. Motion at 2. The section of 39 CFR § 121.1(a) cited by Popkin discusses a “consideration” for determining mail eligible for overnight delivery. It does not contain a requirement that can be evaluated for compliance.

The Postal Service asserts that the applicable Private Express Statutes reduce, but do not eliminate the risk of commercial harm that could result from disclosure. *Id.* at 2-3. The Private Express Statutes still significantly protect the Postal Service’s handling of First-Class Mail. The argument that the Private Express Statutes have been weakened though the enactment of the PAEA is not persuasive in this instance.

The Postal Service argues that current protective conditions serve the public interest by protecting information and allow for access to the material when requested. Reply at 6.

The Postal Service recites a litany of arguments that might potentially support disclosure that were not made by Popkin. See Postal Service Reply at 4. However, the fact that Popkin fails to make any one of these arguments is not fatal to his position.

Finally, the Postal Service asserts that a similar dispute in Docket No. C2001-3 was resolved by the Commission without requiring public disclosure of comparable

data. The Postal Service states: "In that instance, protective conditions were upheld." Reply at 6. The ruling in Docket No. C2001-3 recognizes that the parties came to an agreement on the appropriate level of protection for the material in question. It deems the issue resolved. The ruling is silent on the issue of upholding protective conditions.⁵

Conclusion. The Postal Service has made a minimal showing supporting non-public treatment of library reference USPS-LR-N2012-1/NP7 in its application for non-public treatment. The application forms a rebuttable presumption that the library reference requires non-public treatment. The presumption may be overcome by the presentation of fact or argument that tip the commercial injury versus financial transparency balancing test provided by 39 CFR § 3007.33 in favor of public disclosure.

Both parties to this dispute come up short in furthering their respective positions. Popkin argues that the data concerns a market dominant product. This fact weighs in favor of disclosure, but it is not decisive on the issue. The Postal Service alleges potential commercial harm, but is unpersuasive in supporting this claim.

It is possible that in the future some other party may seek to have this or similar information filed under seal made public. It is noted that Popkin did not review the library reference under seal prior to filing his Motion. In general, it would be advisable for any party seeking to unseal a library reference to review and become familiar with the material under seal prior to filing any future motion. This step may lead to better informed argument as to whether or not the material requires protective treatment.

The Motion is denied.

⁵ See Docket No. C2001-3, Presiding Officer's Ruling Concerning DFC/USPS-7 and Other Discovery Matters, August 27, 2003 at 2.

RULING

David B. Popkin Motion Number 1, filed on January 9, 2011, is denied.

Ruth Y. Goldway
Presiding Officer